No. 94-1383

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BLOOMINGDALE PUBLIC SCHOOLS, a Michigan Corporation;
BLOOMINGDALE PUBLIC SCHOOL BOARD,

Petitioners,

—v.—

DOTT WASHEGESIC, as next friend to Eric Pensinger,
ERIC PENSINGER, with Dott Washegesic as next friend of,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I

Did the lower courts err in their fact-based determination that the prominent display of a portrait of Jesus Christ in a public secondary school, unrelated to any course or curriculum and not part of a larger secular display, violates the Establishment Clause?

II

Did the lower courts correctly hold that respondent continues to have standing to challenge the constitutionality of a religious display with which, after his graduation, he continued to have frequent and unwelcome contact?

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STATEMENT OF THE CASE

The religious display declared unconstitutional in this case is a two-by-three foot portrait of Jesus Christ, which is prominently displayed in a public secondary school hallway. *See* District Court Opinion, Pet. App. at A-3. It is located at the intersection of two main hallways just outside the principal's office, near the gymnasium. *See id.* Almost all of the students who attend the school, which includes the seventh through twelfth grade, pass by the portrait at least once a day. *See id.*

The portrait is not part of a larger display, and it is not placed in any historical, ethical, or artistic context. *See id.* at A-8. School officials control the content of what is placed on the school walls; they are not freely available for communication. *See id.* at A-14, n. 16. School officials were unable to assert *any* purpose, let alone a secular one, for the display of the portrait. *See id.* at A-7. The District Court specifically found "that any reasonable observer would find that the picture of Jesus transmits a religious message." *See id.* at A-12.

Respondent Eric Pensinger was a 17-year-old senior at the school when this action was filed. He graduated from the school in June 1993, though the Sixth Circuit found that he continues to visit the school to attend various events, and comes into direct and unwelcome contact with the display each time he is in the hall. *See Washegesic* v. *Bloomingdale Public Schools*, 33 F.3d 679, 681, 682-3 (6th

Cir. 1994); Pet. App. at B-3 to B-6.[1]

On the merits, the District Court held that the religious display was unconstitutional. The Sixth Circuit, in a unanimous decision authored by Chief Judge Merritt, upheld the district court in all respects, stating:

> The case would be different if the school had placed representative symbols of many of the world's great religions on a common wall. But Christ is central only to Christianity, and his portrait has a proselytizing, affirming effect that some non-believers find deeply offensive.

See Washegesic, 33 F.3d at 684; Pet. App. at B-8.

REASONS FOR DENYING THE WRIT

I. THE LOWER COURTS CORRECTLY APPLIED THIS COURT'S PRECEDENTS IN MAKING THE FACT-BASED DETERMINATION THAT THE DISPLAY IN A SECONDARY PUBLIC SCHOOL OF A PORTRAIT OF JESUS CHRIST WHICH IS UNRELATED TO ANY COURSE OR CURRICULUM VIOLATES THE ESTABLISHMENT CLAUSE

Despite Petitioners' attempt to create new factual and legal issues, the issue presented here is purely contextual: whether the District Court erred in applying *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), in determining the

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[1]No standing issue was raised in the District Court. Petitioners raised a standing issue in the Sixth Circuit by motion and supported with affidavits, arguing that Pensinger's graduation from the school made his claim moot. Respondents filed a response, including an affidavit of Mr. Pensinger. The Court of Appeals, based upon the undisputed affidavit testimony of Pensinger, made factual findings that Pensinger continued to come into repeated, direct and unwelcome contact with the portrait.

constitutionality of a portrait of Jesus Christ, which is neither related to any course or curriculum nor part of a larger secular display, and is prominently placed in a public secondary school building. The District Court, as affirmed by the Court of Appeals, undertook a comprehensive and thorough analysis of Establishment Clause cases, particularly this Court's decisions in *Stone* v. *Graham*, 449 U.S. 39 (1980), and *Lee* v. *Weisman*, ___ U.S. ___, 112 S.Ct. 2649 (1992). The District Court and the Court of Appeals opinions carefully considered both the religious nature of the portrait and the effect of its display in a public school building at which children in the seventh through twelfth grades attend classes, and other members of the community attend social functions.

In *Stone v. Graham*, 449 U.S. 39 (1980), this Court held that the posting of a copy of the Ten Commandments on public school classroom walls violated the Establishment Clause. This Court rejected the state's claimed secular purpose, declaring that "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no [ ] recitation of a supposed secular purpose can blind us to that fact." *Id.* at 41. This Court noted:

> This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. Posting of religious texts on the wall serves no such educational function.

Id. at 42 (citing *Abington School District v. Schempp*, 374 U.S. 203, 225 (1963)).

A portrait of Jesus Christ which is unrelated to any course or curriculum and not part of a larger secular display is likewise "undeniably [ ] sacred" in the Christian faith, and this Court should not be blinded to that fact by Petitioners' contrived assertions of secular purpose.

Moreover, just three terms ago this Court reiterated the "heightened concerns with protecting the freedom of conscience from subtle coercive pressure in the elementary and secondary schools." *Lee v. Weisman*, ___ U.S. at ___, 112 S.Ct. at 2658. In *Lee*, this Court struck down *nonsectarian* prayers at public school graduation ceremonies. This Court rejected the suggestion that the plaintiffs were super-sensitive, or the violation minimal:

> [W]e think that the intrusion is greater than the two minutes or so of time consumed for prayers like these. Assuming, as we must, that the prayers were offensive to the student and the parent who now object, *the intrusion was both real and, in the context of a secondary school, a violation of the objectors' rights.*

Id. at 2659 (emphasis added).

If an annual public high school event that includes a nonsectarian prayer which takes no more than two minutes violates the Establishment Clause, so too does a permanent portrait of Jesus Christ in a public secondary school which is unrelated to any course or curriculum and which must be viewed by each and every student and member of the community that enters the school.

II. THE COURT OF APPEALS CORRECTLY HELD THAT RESPONDENT, WHO STILL COMES INTO REPEATED, DIRECT AND UNWELCOME CONTACT WITH THE PORTRAIT, CONTINUES TO HAVE STANDING TO CHALLENGE THE DISPLAY.

Likewise, plenary review of the standing issues raised by Petitioners would be pointless. The Court of Appeals holding that Respondent continued to have standing after he graduated from the school is entirely consistent with this Court's decision in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). The Court of Appeals found that Pensinger continued to come into repeated, direct and unwelcome contact with the religious display. *Washegesic* v. *Bloomingdale Public Schools*, 33 F.3d 679, 681, 682-3 (1994); Pet. App. at B-3, B-6. Petitioner has failed to indicate how these factual findings conflict with this Court's standing jurisprudence under the Establishment Clause.

At least four other Circuits have reached similar conclusions in holding that a citizen's impairment of the full use and enjoyment of a public facility due to a religious display confers standing.[2] No Circuit has decided

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[2]*See Gonzales v. North Township of Lake County, Indiana*, 4 F.3d 1412, 1416 (7th Cir. 1993)(plaintiffs' claim that they avoided the area of the public park where a crucifix memorial was displayed conferred standing); *ACLU of Illinois v. City of St. Charles*, 794 F.2d 265, 268-69 (7th Cir. 1986), *cert. den.*, 479 U.S. 961 (1986)(individuals' altering of behavior to detour in order to avoid illuminated cross on a fire department building is sufficient injury to confer standing); *Harvey v. Cobb County*, 811 F. Supp. 669, 675 (N.D. Ga. 1993), *aff'd*, 15 F.3d 1097 (11th Cir. 1994), *cert. den.*, ___ U.S. ___, 114 S.Ct. 2138 (1994)(citizen attorney whose job on occasion brought him into direct contact with a display of a panel of the Ten Commandments hanging in the courthouse, had standing); *ACLU v. Rabun County*, 698 F.2d 1098 (11th Cir. 1983), *modifying* 678 F.2d 1379 (11th Cir. 1982)(citizens

a case which conflicts with these decisions, and Petitioner does not claim that there is a conflict between any Circuits.[3]

The Petitioners' argument regarding the affidavit submitted to the Court of Appeals by Respondents is highly misleading and incomplete. Petitioners fail to indicate to this Court that it was Petitioners who first submitted affidavits to the Court of Appeals regarding Mr. Pensinger's graduation. *See* fn. 1, *supra*. In complete accordance with Fed. R. App. Pro. 27(a), Respondents filed a response, which included an affidavit. Despite ample opportunity to do so, Petitioners never submitted any contrary documents regarding the assertions made in Mr. Pensinger's affidavit. The Court of Appeals quickly dismissed this same contention at the oral argument of this case.

The Bloomingdale Public Schools are simply seeking Supreme Court review on standing issues properly disposed of by specific factual findings.

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alleging impairment of full use and enjoyment of state park due to illuminated cross had standing); *Ellis v. City of La Mesa*, 990 F.2d 1518, 1523 (9th Cir. 1993), *cert. den. by County of San Diego v. Murphy*, ___ U.S. ___, 114 S.Ct. 2707 (1994)(citizens who had full use and enjoyment of public parks impaired due to the presence of crosses had standing to challenge displays); *Murray v. Austin*, 947 F.2d 147, 151 (5th Cir. 1991), *cert. den.*, ___ U.S. ___, 112 S.Ct. 3028 (1992)(citizen who alleged exposure to city insignia which contained a cross had standing to challenge the insignia).

[3]Petitioners' suggestion that the Court of Appeals decision created an intra-Circuit conflict -- and it did not -- is not a sufficient basis for this Court to grant review. *See Davis v. United States*, 417 U.S. 333, 340 (1974).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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DATED: March 10, 1995